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Chee Kok Lim v Mayban Securities Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–462–02 OF 2012
ABDUL MALIK ISHAK, LINTON ALBERT AND LIM YEE LAN JJCA
11 AUGUST 2014

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Civil Procedure — Appeal — Appeal against judgment of High Court — Dispute on contra losses arising from contra losses incurred in trading accounts — Stockbroking — Indemnity when client fails to pay within time allowed under rules of exchange — Stockbroking company forced to sell shares in market when remisier's clients paid to pay on seventh day — Rules of eighth day — Stockbroking company deducted contra losses from remisier's security deposit — Whether responsibility on stockbroking company to instruct remisier to force sell shares of defaulting clients on eighth day of transaction — Claim for damages and deposit paid

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This was an appeal against the decision of the High Court dismissing both the appellant's claim and the respondent's counterclaim against each other arising from contra losses incurred in the trading accounts of clients handled by the appellant. The appellant was a licensed dealer's representative under the repealed Securities Industry Act 1983 while the defendant was a stock broking company. The appellant served the respondent as a remisier and their contractual relationship was governed by three remisier agreements and a supplemental agreement. The purpose of the contra losses the relevant agreement was the agreement dated 2 September 1993 ('the 1993 Agreement'). Under cl 3(2) of the 1993 Agreement, the appellant was required to indemnify the respondent, inter alia, against all losses where a buying client fails to pay within the time allowed by the rules of the exchange or within such time if any allowed by the respondent and the respondent has to force sell the shares in the market and incurs a loss in so doing. Pursuant to cl 5 of the agreement, the appellant was required to maintain a security deposit with the respondent in the sum of RM100,000 which sum can be increased from time to time by notice given by the respondent and cl 5(4) entitles the respondent to debit from the security deposit any sum which is overdue and owing to the respondent from the appellant and/or his client or clients. Between April and May of 1996, certain clients of the respondent instructed the appellant to buy shares listed on the KLSE but the said clients failed to make payment for their shares. The respondent force sold their shares through the appellant, which resulted in contra losses to the respondent. The respondent then deducted the contra losses from the appellant's security deposit maintained under cl 5. The appellant disputed the deduction of the contra losses from his security deposit

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and argued that under the then KLSE Rules in force, the responsibility was on the respondent to instruct the appellant to force sell the shares of the defaulting clients on the eight day of transaction ('T+8'). In this case, the respondent only instructed the appellant to force sell the shares much later than T+8. The appellant contended that as a result of the wrongful deduction, as at 20 April 2001, his security deposit stood at only RM13,696. The appellant also alleged that the respondent unlawfully terminated his appointment as a remisier on the pretext that there was insufficient fund in his security deposit account to debit further contra losses from the said clients. Aggrieved the appellant commenced an action at the High Court and claimed for damages and deposit paid. At the conclusion of the trial, the judicial commissioner ('the JC') dismissed the appellant's claim and the respondent's counterclaim. Hence, the present appeal.

Held, dismissing the appeal and allowing the cross-appeal:

(1) There was no appealable error on the part of the trial judge in finding that based on the facts of the case, the appellant was contractually liable to indemnify the respondent under cl 3(2)(b) of the 1993 Agreement for contra losses suffered by the respondent. Both parties were in agreement that the contractual relationship between a stock broker and its remisiers is not governed strictly by the remisier agreements signed between them, but also by the rules and circulars of the KLSE (see paras 76–77).

(2) The securities industry in Malaysia is regulated by law and the law applicable during the time of the share purchases was the Securities Industry Act 1983 ('the SIA'). The said Act, inter alia, governs the conduct of stock brokers as member companies of the KLSE by the KLSE whose own conduct is in turn governed by the Securities Commission as the regulatory body overseeing the securities industry in this country. In particular, s 9B(1) and (3) of the SIA provides that it shall be the duty of the KLSE to ensure, so far as may be reasonably practicable, an orderly and fair market in the securities that are traded through its facilities and shall take appropriate action as may be provided for under its rules for the purpose of monitoring or securing compliance with such rules (see paras 78–79).

(3) The issue in this appeal is really not whose obligation it was to comply with the T+8 rule but whether instruction had been issued by the respondent to the appellant to sell at T+8. The object of cl 1 of the 1993 Agreement was to ensure that all share transactions entered into by the respondent's traders, trader's representatives and remisiers on its behalf comply with the rules and circular of the KLSE for the time being in force. By his own account, the appellant had been a remisier with the respondent for ten years before the contra losses were incurred. The

appellant should have been well versed with the T+8 rule as well as the policy and procedure of the respondent on this matter (see paras 84–85 & 89).

(4) The JC had not misdirected himself on the law and the facts when he held that under cl 3(2)(b) of the agreement the appellant was liable to indemnify the respondent for the contra losses. His findings were not against the weight of the evidence before him nor were his findings of the kind that no reasonable court having properly directed itself and asked the right questions would have arrived at the same conclusion. There was no reason for appellate intervention on our part (see para 95).

(5) The respondent's counterclaim was for the contra losses which the respondent was not able to deduct or set-off from the appellant's security deposit due to insufficient fund. The primary evidence which was not seriously disputed by the appellant, was more than sufficient to prove the quantum of the respondent's counterclaim on a balance of probabilities (see paras 96 & 101).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi menolak kedua-dua tuntutan perayu dan tuntutan balas responden terhadap satu sama lain yang timbul daripada kerugian kontra yang ditanggung dalam akaun-akaun dagangan pelanggan-pelanggan yang dikendalikan oleh perayu. Perayu adalah wakil peniaga berlesen di bawah Akta Industri Sekuriti 1983 manakala defendan adalah syarikat broker saham. Perayu telah berkhidmat dengan responden sebagai remiser dan hubungan kontraktual mereka dikawal oleh tiga perjanjian remiser dan satu perjanjian tambahan. Tujuan kontra kerugian perjanjian yang berkaitan adalah perjanjian bertarikh 2 September 1993 ('Perjanjian 1993'). Di bawah fasal 3(2) Perjanjian 1993, perayu dikehendaki untuk mengindemniti responden, antara lain, terhadap semua kerugian di mana pelanggan yang membeli gagal untuk membayar dalam tempoh masa yang dibenarkan oleh peraturan pertukaran atau dalam masa tersebut jika ada dibenarkan oleh responden dan responden terpaksa menjual saham di pasaran dan menanggung kerugian dengan berbuat demikian. Menurut fasal 5 perjanjian itu, perayu dikehendaki mengekalkan deposit sekuriti dengan responden dalam jumlah RM100,000 yang mana jumlah itu boleh ditambah dari masa ke semasa melalui notis yang diberikan oleh responden dan fasal 5(4) memberi hak kepada responden untuk mendebitkan daripada deposit sekuriti itu apa-apa jumlah yang tertunggak dan terhutang kepada responden daripada perayu dan/atau pelanggan atau pelanggan-pelanggannya. Antara April dan Mei 1996, pelanggan-pelanggan tertentu responden telah mengarahkan perayu membeli saham yang disenaraikan di BSKL tetapi pelanggan-pelanggan tersebut telah gagal membuat bayaran untuk saham-saham mereka. Responden terpaksa menjual saham-saham mereka melalui perayu, yang mengakibatkan kerugian kontra kepada responden.

Responden kemudian telah menolak kerugian kontra itu daripada deposit sekuriti perayu yang diselenggarakan di bawah fasal 5. Perayu telah mempertikaikan potongan kerugian kontra itu daripada deposit sekuritinya dan berhujah bahawa di bawah peraturan BSKL yang berkuat kuasa, tanggungjawab itu terletak pada responden untuk mengarahkan perayu untuk memaksa jual saham-saham pelanggan-pelanggan yang gagal itu pada hari kelapan transaksi ('T+8'). Dalam kes ini, responden hanya mengarahkan perayu untuk memaksa jual saham-saham itu selepas T+8. Perayu berhujah bahawa akibat daripada potongan yang salah itu, sehingga 20 April 2001, deposit sekuritinya hanya pada harga RM13,696. Perayu juga mendakwa bahawa responden secara tidak sah telah menamatkan pelantikannya sebagai remiser dengan helah bahawa tidak terdapat dana mencukupi dalam akaun deposit sekuritinya untuk selanjutnya mendebitkan kerugian kontra daripada pelanggan-pelanggan tersebut. Terkilan dengan itu perayu telah memulakan tindakan di Mahkamah Tinggi dan menuntut ganti rugi dan deposit berbayar. Di akhir perbicaraan, pesuruhjaya kehakiman ('PK') telah menolak tuntutan perayu dan tuntutan balas responden. Justeru, rayuan ini.

Diputuskan, menolak rayuan dan membenarkan rayuan balas:

(1) Tiada kesilapan yang boleh dirayu di pihak hakim perbicaraan dalam mendapati bahawa berdasarkan fakta kes, perayu bertanggungjawab secara kontraktual untuk mengindemniti responden di bawah fasal 3(2)(b) Perjanjian 1993 untuk kerugian kontra yang dialami oleh responden. Kedua-dua pihak bersetuju bahawa hubungan kontraktual antara broker saham dan remisernya tidak dikawal dengan ketat oleh perjanjian-perjanjian remiser yang ditandatangani antara mereka, tetapi juga oleh peraturan-peraturan dan pekeliling-pekeliling BSKL (lihat perenggan 76–77).

(2) Industri sekuriti di Malaysia dikawal oleh undang-undang dan undang-undang yang terpakai sepanjang masa belian saham adalah Akta Industri Sekuriti 1983 ('AIS'). Akta tersebut, antara lain, mengawal perilaku broker saham sebagai ahli syarikat BSKL oleh BSKL yang mana perilakunya sendiri sebaliknya dikawal oleh Suruhanjaya Sekuriti sebagai badan kawal selia yang memantau industri sekuriti dalam negara ini. Khususnya, s 9B(1) dan (3) AIS memperuntukkan bahawa adalah menjadi kewajipan BSKL untuk memastikan, setakat mana mungkin boleh dikatakan munasabah, pasaran yang teratur dan adil dalam sekuriti itu yang didagang melalui kemudahannya dan hendaklah mengambil tindakan sesuai yang mungkin diperuntukkan di bawah peraturan-peraturannya bagi tujuan memantau dan menjamin pematuhan peraturan-peraturan tersebut (lihat perenggan 78–79).

(3) Isu dalam rayuan ini bukan mengenai tanggungjawab siapa untuk mematuhi peraturan T+8 itu tetapi sama ada arahan telah diberikan oleh

responden kepada perayu untuk menjual T+8. Tujuan fasal 1 Perjanjian 1993 adalah untuk memastikan bahawa semua transaksi saham yang dimasuki oleh peniaga-peniaga responden, wakil-wakil peniaga dan remiser bagi pihaknya mematuhi peraturan-peraturan dan pekeliling BSKL dari masa ia dikuatkuasakan. Menurutnya, perayu telah menjadi remiser dengan responden selama sepuluh tahun sebelum kerugian kontra ditanggung. Perayu patut memahami peraturan T+8 dan juga polisi dan prosedur responden berhubung perkara ini (lihat perenggan 84–85 & 89).

(4) PK itu tidak salah arah dari segi undang-undang dan fakta apabila beliau memutuskan bahawa di bawah fasal 3(2)(b) perjanjian perayu bertanggungjawab mengindemniti responden untuk kerugian kontra itu. Penemuan beliau tidak bercanggah dengan beban keterangan di hadapannya mahupun penemuannya adalah suatu yang mana tiada mahkamah sewajarnya boleh mengarahkan sendiri dan menanyakan persoalan betul yang akan membawa kepada kesimpulan yang sama. Tiada sebab untuk campur tangan rayuan di pihak kami (lihat perenggan 95).

(5) Tuntutan balas responden adalah untuk kerugian kontra yang mana responden tidak dapat menolak atau mengetepikan daripada deposit sekuriti perayu akibat dana tidak mencukupi. Keterangan utama yang tidak dipertikaikan dengan serius oleh perayu, adalah lebih daripada mencukupi untuk membuktikan kuantum tuntutan balas responden atas imbangan kebarangkalian (lihat perenggan 96 & 101).]

Notes

For cases on appeal against judgment of High Court, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 871–879.

Cases referred to

Cheah Oon Leng, Winnie v Arab-Malaysian Securities Sdn Bhd [2009] 1 LNS 1250; [2010] 7 AMR 389, HC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Huang Chang Hsun Francis v Hwang & Yusoff Securities Sdn Bhd [1992] 2 MLJ 305, HC (refd)

Khairuddin Abd Rahman v Capital Corp Securities Sdn Bhd [2001] 1 LNS 148, HC (refd)

Kuala Lumpur City Securities Sdn Bhd v Yap Say Woon [2011] 1 LNS 133, HC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

OCBC Bank (M) Bhd v CTK Enterprise Sdn Bhd [2000] 6 MLJ 372; [2000] 6 CLJ 158, HC (refd)

Pan Malaysia Equities Sdn Bhd v Angeline Tan Eei We [2010] MLJU 1528; [2011] 1 CLJ 923, HC (refd)
Theresa Chong v Kin Khoon & Co [1976] 2 MLJ 253; [1976] 1 LNS 165, FC (refd)

Legislation referred to

Evidence Act 1950 ss 90A, 114(g)
Securities Industry Act 1983 (repealed by Capital Market and Services Act 2007) ss 2, 9B(1), (3), 11(1), (2)

Appeal from: Civil Suit No 22–88 of 2003 (High Court, Ipoh)

Loh Siew Chang (Kelvin Seet Wan Nam and Venda Chai with him) (Cheang & Ariff) for the appellant.
Faizul Hilmy (Nathan S Eliatamby with him) (WY Chan & Roy) for the respondent.

Lim Yee Lan JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal is against the decision of the Ipoh High Court dated 23 April 2012, which dismissed both the appellant's claim and the respondent's counterclaim against each other arising from contra losses incurred in the trading accounts of clients handled by the appellant. We had earlier by a unanimous decision dismissed the appellant's appeal and allowed the respondent's cross-appeal and set aside the decision of the High Court. We now give the reasons for our decision.

BACKGROUND FACTS

[2] The appellant was a licensed dealer's representative under the repealed Securities Industry Act 1983 while the defendant (formerly known as PhileoAllied Securities Sdn Bhd) was a stock broking company.

[3] The appellant served the respondent as a remisier since 1993 and their contractual relationship was governed by three remisier agreements dated 2 September 1993 and 3 May 1999, and a supplemental agreement dated 1 October 1998. Parties agreed, which is also the JC's findings that for the purpose of the contra losses the relevant agreement is the agreement dated 2 September 1993 ('the 1993 Agreement').

[4] Under cl 3(2) of the 1993 Agreement, the appellant was required to indemnify the respondent, inter alia, 'against all losses where a buying client fails to pay within the time allowed by the Rules of the Exchange or within such

time if any allowed by the Respondent and the Respondent has to force sell the shares in the market and incurs a loss in so doing'. Pursuant to cl 5 of the agreement, the appellant was required to maintain a security deposit with the respondent in the sum of RM100,000 which sum can be increased from time to time by notice given by the respondent to the appellant and cl 5(4) entitles the respondent to debit from the security deposit any sum which is overdue and owing to the respondent from the appellant and/or his client or clients.

[5] Between April and May of 1996, certain clients of the respondent instructed the appellant to buy shares listed on the KLSE. These included five clients by the name of Ng Bee Lee ('NBL'), Wong Mun Wah ('WMW'), Shin Yik Yeen ('SYY'), Chan Soon Ngan ('CSN') and Teh Chin Kee ('TCK').

[6] The said clients failed to make payment for their shares by the seventh day of the transaction, in accordance with the KLSE Rule then in force. This prompted the respondent to force sell their shares through the appellant, which resulted in contra losses to the respondent.

[7] Pursuant to cl 3(2) the respondent then proceeded to deduct the contra losses from the appellant's security deposit maintained under cl 5.

[8] The appellant disputed the deduction of the contra losses from his security deposit. According to the appellant, under the then KLSE Rules in force, the responsibility was on the respondent to instruct the appellant to force sell the shares of the defaulting clients on the eighth day of transaction ('T+8'). In this case, the respondent only instructed the appellant to force sell the shares on 17 May 1996, which was much later than T+8, as indicated in the force selling reports issued to the appellant.

[9] The force selling reports also showed that the respondent failed to deliver or allocate the bought shares to the buying clients by 'T+7', in breach of the KLSE regulations. The appellant contended that without such allocation of shares it would be impossible for him to carry out the force selling by T+8.

[10] The appellant contended that as a result of the wrongful deduction, as at 20 April 2001, his security deposit stood at only RM13,696. This in turn had reduced his trading limit which was fixed by the respondent based on the balance standing in his deposit.

[11] The appellant also alleged that the respondent unlawfully terminated his appointment as a remisier at or around 2 April 2001 on the pretext that there was insufficient fund in his security deposit account to debit further contra losses from the said clients.

[12] The appellant alleged that the unlawful termination of his appointment as a remisier by the respondent and/or its failure to renew his dealer's representative licence caused him to loose his entitlement to KLSE shares upon its demutualisation on 21 November 2002, which was estimated to be 12 lots or 12,000 shares based on his ten years' service as a remisier.

[13] Aggrieved by the various actions of the defendant, the appellant commenced this action at the Ipoh High Court in 2013 in which he claims, inter alia, the following reliefs against the defendant:

(a) RM585,204.57, as special damages, being the sum debited from the his security deposit for the contra losses of the respondent;

(b) general damages, including exemplary and or punitive damages, for breach of the 1993 Agreement;

(c) return of RM2,000 and RM7,4470.26 representing deposit paid by the appellant in bankruptcy proceedings taken against SYY; and

(d) interests at 8%pa for damages to be calculated from the date of notice of demand dated 3 June 2002 until full realisation, and costs.

[14] The respondent in its amended statement of defence and counterclaim denies the appellant's claim and in turn counterclaims for a sum of RM693,370.23 calculated as at 9 May 2008, representing additional contra losses suffered by the respondent which could not be debited from the appellant's security deposit account.

DECISION OF THE HIGH COURT

[15] At the conclusion of the trial, the learned judicial commissioner ('the JC') dismissed both the plaintiff's claim and the defendant's counterclaim.

[16] In coming to his decision, the learned JC made various findings of fact and law. In particular, the learned JC found that the applicable agreement governing the dispute between the parties was the 1993 Agreement. He also found that under cl 3(2) of the agreement the appellant was contractually liable to indemnify the respondent, inter alia, for any loss suffered by the respondent including contra losses incurred after force selling of a defaulting client's unpaid shares.

[17] The learned JC also made a finding that it has been the practice in the securities industry for any force selling of shares to be carried out by a remisier on the instruction of the stock broker. He also made the finding that in this case, based on the evidence adduced before him, instructions had indeed been given by the respondent to the appellant to force sell the shares of the defaulting

clients on T+8. Consequently, by virtue of cl 3(2) of the agreement, the appellant was liable to indemnify the respondent for the said contra losses.

[18] In regard to the allocation of bought shares into the accounts of the said clients, the learned JC made a finding that even though there was some delay on the part of the respondent, the appellant was still liable to indemnify the respondent for the contra losses under cl 3(2). The learned JC was also of the view that in regard to the shares sold through married deals as opposed to those sold on the open market, there was no requirement for allocation of shares.

[19] The learned JC also found that the respondent had, on the request of the appellant, taken all reasonable steps including legal proceedings to recover the contra losses from the said defaulting clients.

[20] In regard to the appellant's claim for loss of income due to his unlawful suspension and termination as a remisier by the respondent, the learned JC found no merit in the claim as such loss was due to the trading limit imposed on the appellant. In the premises, the learned JC dismissed the entire claim of the appellant against the respondent.

[21] Coming to the respondent's counterclaim against the appellant, the learned JC found that there was insufficient documentary evidence to prove the quantum of the claim. The respondent failed to call any one with personal knowledge of the claim to tender the documentary evidence for the respondent. Section 90A of the Evidence Act 1950 had not been complied with which entitled s 114(g) of the Evidence Act to be invoked against the respondent. In the premises, the learned JC dismissed the counterclaim. Both parties were also ordered to bear their own costs of the proceedings.

THE APPEAL

[22] Before us, learned counsel for the appellant contended that the learned JC erred in holding that the appellant was liable to indemnify the respondent for the contra losses under cl 3(2) of the 1993 Agreement as such a finding reflects his misunderstanding regarding the delivery and settlement system of share transactions on the KLSE before the introduction of the script less transactions.

[23] It was submitted that the real issue in this appeal is whether the appellant is liable to indemnify the respondent for contra loss under cl 3(2)(b) of the 1993 Agreement when a buying client failed to make payment for shares by T+7 and the respondent failed to instruct appellant to force sell the shares on T+8 in accordance with KLSE Rules and accepted industry practice?

[24] It was submitted that the answer to this issue entails an understanding of how the securities industry in Malaysia works. Firstly, in the securities industry, stock brokers are member companies of the KLSE and their conduct as member companies are bound by rules, circulars and directives issued from time to time by the KLSE (see *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253; [1976] 1 LNS 165).

[25] This working of the security industry was given due recognition in cl 1 of the 1993 Agreement which states clearly that 'all transactions entered into by the remisier shall comply with the Rules of the Exchange and the provisions of all rules, regulations and directives made thereunder for the time being in force and the custom and accepted practice of the security industry in Malaysia'.

[26] Secondly, in the securities industry, the relationship between a stock broker and its remisier is that of principal and agent, with the stock broker as the principal and the remisier/trader's representative as the agent (see *Cheah Oon Leng, Winnie v Arab-Malaysian Securities Sdn Bhd* [2009] 1 LNS 1250; [2010] 7 AMR 389 and *Kuala Lumpur City Seurities Sdn Bhd v Yap Say Woon* [2011] 1 LNS 133).

[27] It was submitted that in the light of the aforesaid recognised industry practice and custom and cl 1 of the 1993 Agreement, cl 3(2)(b) of the agreement on indemnity cannot be read in isolation and must be construed together with any KLSE rule or directive which may be issued from time to time (see *Huang Chang Hsun Francis v Hwang & Yusoff Securities Sdn Bhd* [1992] 2 MLJ 305).

[28] It is not disputed that between April and May 1996, the relevant KLSE rules governing share transactions on the KLSE were the 'Minimum Standards Of Business Conduct For Securities Transactions By Member Companies of the Kuala Lumpur Stock Exchange' issued vide Members Circular No R/R of 1994 dated 18 March 1984 and the 'KLSE Fixed Delivery and Settlement System' issued vide Members Circular No 373 of 1990.

[29] Members Circular No R/R of 1994 specifically provides that member companies shall ensure that they will close the purchase positions of their clients who fail to pay for their purchases by 12.30pm on the seventh market day after contract date by selling out on the eighth market day. Members' Circular No 373 of 1990, on the other hand, provides among others that:

(a) a member company shall deliver the shares to buying client latest by 12.30pm on seventh market day following the date of contract (T+7);

(b) a buying client shall settle the payment for the shares latest by 12.30pm on T+7; and

(c) when a buying client fails to pay for his purchase by 12.30pm on T+7, member company shall sell out the shares by eighth market day following the date of contract (T+8).

[30] Thus, reading cl 3(2)(b) of the 1993 Agreement in the light of the Members Circular No R/R of 1994 and Members' Circular No 373 of 1990, it was obvious that firstly, the obligation to force sell shares of defaulting buying clients at T+8 rests with the respondent and secondly, the words 'where the Company has had to sell in the open market for the same securities and incurred a loss in so doing' appearing in cl 3(2)(b) presupposed that the respondent, as the principal, had instructed the appellant, its agent, to force sell the shares of the said clients on T+8 and the appellant did carry out the instruction which resulted in contra losses to the respondent.

[31] In other words, the indemnity given by the respondent to the appellant in cl 3(2)(b) would apply only where firstly, an instruction was given by the respondent to force sell by T+8, secondly, the instruction was given before T+8 and thirdly, the plaintiff did carry out the force selling on T+8 and incurred contra losses.

[32] In this case, the force selling reports issued by the respondent to the appellant clearly showed that the instructions to to force sell the shares were given well after T+8.

[33] It was further submitted that force selling on T+8 cannot arise unless the respondent transfers, allocates or appropriates in its system the shares bought into the trading accounts of the purchasing clients on T+7, and 'close off' purchase positions of clients who failed to pay for their purchases on T+7.

[34] In this case, the same force selling reports also showed that the respondent transferred or allocated the shares to the said purchasing clients well after T+8.

[35] Consequently, the appellant was not liable to indemnify the respondent for the contra losses under cl 3(2)(b) and the deduction from the appellant's security deposit of such contra losses was without contractual basis (see *Cheah Oon Leng, Winnie v Arab-Malaysian Securities Sdn Bhd* [2009] 1 LNS 1250; [2010] 7 AMR 389).

[36] The respondent must therefore refund to the appellant the amended sum of RM259,390.41 representing the amount deducted from his security deposit as contra losses, as pleaded in para 64(a) of the amended statement of claim.

[37] It was also submitted that quite apart from the refund of the aforesaid sum deducted from his security deposit, the appellant is also entitled to a sum of RM157,008 which represents the estimated fair value of the 12,000 Bursa Malaysia Shares which he would have been entitled to upon the privatisation of the KLSE had his appointment as a remisier not been terminated by the defendant.

[38] In addition, the appellant is also entitled to lost commission, estimated at RM4,370,267.50, which he would have earned if not for the unauthorised and illegal suspension of his trading limit and the non-renewal of his trader's representative licence by the respondent.

[39] In conclusion, it was submitted that the appellant's claims ought to be allowed and the respondent's counterclaim, which was found to be not proven by the learned trial judge, ought to be dismissed with costs.

[40] In reply, learned counsel for the respondent conceded that based on cl 1 of the 1993 Agreement, case law authorities (see *Cheah Oon Leng, Winnie v Arab-Malaysian Securities Sdn Bhd* [2009] 1 LNS 1250; [2010] 7 AMR 389 and *Kuala Lumpur City Securities Sdn Bhd v Yap Say Woon* [2011] 1 LNS 133) and the two aforementioned member circulars issued by the KLSE, the obligation to force sell shares of defaulting purchaser clients rests with the respondent as a member company of the KLSE.

[41] Be as it may, it was contended that the real issue in this appeal is not who has the obligation to force sell shares of defaulting purchaser clients, but whether the respondent as the stock broker had given due instruction to the appellant as the remisier to force sell the shares on T+8? If the answer is in the affirmative, then by virtue of cl 3(2)(b) of the 1993 Agreement the appellant would be liable to indemnify the respondent for contra losses and by virtue of cl 5 the respondent was entitled to debit such contra losses from the appellant's security deposit.

[42] It was contended that in this case, the learned trial judge had made positive findings of fact that prior instructions had been given by the respondent to all its remisiers including the appellant to force sell shares of defaulting clients on T+8 through the following documents:

(a) a memo dated 22 March 1994 (see p 19 of the RRA4) to all remisiers advising them that force selling is to be executed on the eighth day by the company/remisiers without further reference to clients; and

(b) a letter dated 27 September 1994 (see p 18 of the RRA4) in which all remisiers were reminded of the T+8 rule.

[43] It was submitted that this finding of the learned trial judge is supported by the evidence of 'DW1' who, in her witness statement at question and answer 11 at pp 74–75 of appeal record Vol 8, had testified that the memo dated 22 March 1994 operated as a standing instruction to all remisiers from the respondent concerning force selling of shares. A

[44] DW1 in her testimony had also explained that it is not practical or possible for the respondent as a stock broker to give individual instruction to each remisier on the T+8 rule as there were hundreds of remisiers working for the respondent at any one time and they handled thousands of transactions a day for the respondent's clients. B C

[45] During cross-examination, it was put to the appellant that he had actually received the said memo but the appellant was very evasive and refused to answer the question which prompted the learned trial judge to remark 'tiada jawapan' in the notes of proceeding. D

[46] It was submitted that the appellant's purported reliance on the force selling reports issued by the respondent (see one example at p 7 of appeal record Vol 4) as instructions to force sell the shares of the said defaulting clients was misconceived as the purpose of the force selling reports was to show the history of outstanding shares yet to be force sold and were not instructions to the appellant to force sell the unpaid shares. E

[47] On the contrary, the acknowledgment by the appellant at the bottom of each force selling report to the effect that 'I hereby take full responsibility and bear all fines imposed by KLSE should I fail to sell out the above contracts on the eight (8) market day which I have been requested to do so by the company' (see pp 8–9 and 15–17 RR A4) indicated clearly that instruction to force sell the relevant shares had been given earlier by the respondent. F G

[48] In regard to the issue on allocation of shares into the purchasing clients' trading accounts, it was contended that the appellant had again erroneously relied on the forced selling reports under the column 'date allocated' to say that the dates of the allocation or transfer occurred were well after T+8. H

[49] During the trial, the procedure regarding the allocation/delivery of share certificates between seller clients and buying clients was fully explained by DW1 in question and answer 31 of her witness statement, and that the shares were allocated well before T+8, which stood unchallenged by the appellant. Hence, the issue on non-allocation of shares is without merit. I

[50] On the issue relating to allocation of shares in married deals, which refer to sale and purchase of shares among the clients of the same stock broker, the

learned trial judge had also rejected the argument of the appellant and accepted the evidence of DW1 that '... Mahkamah cenderong untuk bersetuju dengan saksi Defendan bahawa untuk married deal tidak perlu kepada allocation of shares seperti saham di pasaran terbuka'. The DW1's testimony on this issue (see paras 27–44 at pp 83–92 appeal record A8) was not contradicted by the appellant and must be deemed to have been accepted.

[51] As for the appellant's claim for loss of commission income of about RM4.3m and loss of share entitlement of about RM157,008 which the appellant claimed was caused by the suspension of his trading limit and or unlawful termination of his appointment as a remisier and or non-renewal of his trader's representative licence, it was submitted that these special damages were never pleaded in the statement of claim and was raised only in submission of counsel and in any case was not proven by any credible evidence during the trial. The figures given by the appellant were speculative and based purely on assumption and conjecture with no documentary evidence to back them up. The learned trial judge had rightly dismissed these two claims.

[52] On the issue of non-renewal of his remisier's licence, DW1 had testified that the power to issue or renew the licence of a trader's representative is vested in the Securities Commission and not the respondent. Since 2001 the SC had imposed a new condition that a trader's representative must acquire at least 20 continuing professional education ('CPE') points a year in order for the licence to be renewed. The appellant had failed to cooperate with the respondent by forwarding proof of his CPE points to enable the renewal of his licence by the Security Commission.

[53] In conclusion, it was submitted that the learned JC in arriving at his decision had taken into consideration all relevant facts and evidence before him as evidenced by the words 'Setelah mendengar dan meneliti semua keterangan dari kedua-dua pihak Mahkamah mendapati ...' (see p 32 of AR Vol A1). The appellant had failed to show to this court that the findings of the learned trial judge which formed the basis of his decision were 'plainly wrong' to warrant any appellate intervention of this court (see *Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC)).

[54] However, in regard to the learned trial judge's dismissal of the respondent's counterclaim for the sum of RM732,270.37, it was submitted that the learned trial judge misdirected himself when he found that 'tiada sebarang dokumen yang menyokong bagaimana amaun tuntutan dikira dan tiada saksi yang benar-benar tahu mengenai pengiraannya dipanggil untuk memberi keterangan'.

[55] It was submitted that the sum claimed by the respondent in its counterclaim represents the contra losses in the trading accounts of SYY, CSN and WMW, calculated as at 21 May 2003, which the respondent was unable to debit from the appellant's security deposit account due to insufficient fund therein.

[56] To prove its counterclaim, the defendant had adduced through DW1 the necessary documentary evidence to explain how the sum was arrived at.

[57] In the case of SYY, DW1 had produced a report known as 'Total Client Outstanding Position Report' (see p 63 AR A6) which showed a total outstanding sum of RM257,301.48 in his trading account as at 28 June 1996, which was made up of a principal sum of RM254,444.49 and interests of RM2,856.99.

[58] DW1 had also adduced a memorandum dated 1 July 1996 issued by the appellant in which he had requested the respondent to demand the outstanding sum from SYY pursuant to the said outstanding position report (see p 62 RR A6).

[59] As no payment was made by SYY pursuant to the demand, the respondent then commenced action against SYY and judgment was obtained against her on 9 July 1999 in the sum of RM258,246.44 together with interests at 12.75%pa and costs (see p 32 RR A6).

[60] DW1 had explained that the outstanding sum shown in the 'Daily Client Account Report' of SYY was based on the judgment sum obtained against SYS plus interests up to 2003 minus all deductions (set-off) made against the appellant's security deposit (see para 119 p 118 of AR Vol A8). DW1 also confirmed that the said report of SYY was given to the appellant (see paras 103–104 p 115 of AR Vol A8).

[61] It was submitted that the appellant failed to challenge or contradict the said 'Daily Client Account Report' of SYY (see pp 84–90 AR Vol A2). The appellant did not deny that the report was given to him. He never challenged this report nor did he adduce any evidence to contradict the same. In his witness statement he merely said:

Q: What do you further wish to say about the Defendant's claim against you?

A: Their claim is baseless and is put to exert pressure on me (see p 69 AR Vol A8 paragraph 320)

[62] The only challenge on the report by the appellant's solicitor during the

cross-examination of DW1 is as follows:

D87 (mukasurat 82–88(A) dirujuk) (ie the Daily Client Account Report)

Peguam: Segala maklumat di laporan ini tidak tepat?

Saksi: Saya tak setuju

Peguam: Laporan ini bukan disedia oleh puan sendiri?

Saksi: la dicetak dari computer syarikat defendan. Pihak IT yang menyediakan laporan ini. la bukan disediakan oleh saya.

Peguam: Ada disini legal fee dan interest?

Saksi: Ya, betul

Peguam: Segala kenyataan ini tidak betul, defendan tak berhak untuk tolak yuran guaman dari plaintiff.

Saksi: Saya tak setuju.

Peguam: Tuntutan faedah dan legal fee ini tidak berasas.

Saksi: Saya tak setuju (see p 162 AR Tambahan)

[63] It was submitted that since the appellant had alleged that the statement in the daily client account report was inaccurate, he has the obligation to at least point out what were the inaccuracies or if the amount is incorrect, what is the correct one (see *OCBC Bank (M) Bhd v CTK Enterprise Sdn Bhd* [2000] 6 MLJ 372; [2000] 6 CLJ 158). Merely suggesting to the defendant's witness that the statement was inaccurate or the amount is incorrect is not enough to contradict the report in view of the documentary evidence adduced before the court.

[64] In the case of CSN, the contra losses resulting from transactions in his trading account (see p 67 of AR Vol A6) as at 26 June 1996 were principal amount of RM171,808.73 + interests RM2,307.37 = RM174,116.10.

[65] Demand for payment of the outstanding sum was made against CSN by the respondent based on the request of the appellant (see p 66 AR Vol A6).

[66] As no payment was received from CSN, legal proceedings were taken against CSN by the respondent and judgment was obtained against him on

16 January 2006 for the principal sum of RM194,003.71 with interests at 12.75% from judgment date until full settlement (see p 37 of AR Vol A6).

[67] Based on the 'Daily Client Account Report' of CSN as at 22 May 2003 (see p 85 of AR Vol A2), the outstanding sum outstanding by CSN was RM68,802.74 and interests at RM80,475.48.

[68] In the case of WMW, the contra losses resulting from the transactions in his trading account (see p 65 of AR Vol A6) as at 28 June 1996 were principal sum of RM162,334.25 and interests of RM1,712.50, totaling RM164,046.75

[69] Legal demand was issued by the respondent against WMW for the outstanding sum on the request of the appellant (see p 64 of AR Vol A6) and judgment was obtained against WMW on 19 February 2003 for the principal sum of RM164,273.55 with interests at 12.75% from the date of judgment until full settlement (see p 34 of AR Vol A6).

[70] Based on the 'Daily Client Account Report' as at 22 May 2003 (see p 90 of AR Vol A2), the principal amount outstanding from WMM was RM4,306.45 and interests in the sum of RM4,127.09.

[71] During the trial the appellant did not seriously challenge the daily client account report relating to CSN and WMW adduced through DW1. Consequently, the aforesaid submission in relation to the daily client account report on SYY would also apply to the case of CSN and WMW.

[72] On the issue raised regarding the claim for legal costs incurred by the respondent, it is clear that such a claim is allowed by cl 3(2) of the agreement which provides that besides contra losses and interests, the appellant is also liable to indemnify the respondent for legal costs/fees incurred by the respondent on a solicitor and client basis. DW1 had explained in her evidence how the legal fees for SYY in the sum of RM23,017.10 and RM15,168 for WMW and had been worked out.

[73] In conclusion, it was submitted that based on the totality of the evidence outlined above, the respondent had proved on a balance of probabilities its counterclaim against the appellant.

[74] It was submitted that the learned trial judge had failed to properly evaluate the evidence placed before him by the respondent and was 'plainly wrong' when he concluded that 'tiada sebarang dokumen yang menyokong bagaimana amaun tuntutan dikira dan tiada saksi yang benar-benar tahu

mengenai pengiraannya dipanggil untuk memberi keterangan'. This misdirection on the part of the learned JC justifies appellate intervention by this court (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309).

[75] The respondent therefore prayed for the appellant's appeal to be dismissed and the respondent's counterclaim to be allowed.

OUR DECISION

[76] Having carefully perused the appeal records and considered the oral and written submissions of the parties, we found no appealable error on the part of the learned trial judge in finding that based on the facts of the case, the appellant was contractually liable to indemnify the respondent under cl 3(2)(b) of the 1993 Agreement for contra losses suffered by the respondent. We say so for the following reasons.

[77] We note that both parties are in agreement that the contractual relationship between a stock broker and its remisiers is not governed strictly by the remisier agreements signed between them, but also by the rules and circulars of the KLSE.

[78] We also note that the securities industry in Malaysia is regulated by law and the law applicable during the time of the share purchases was the Securities Industry Act 1983. The said Act, inter alia, governs the conduct of stock brokers as member companies of the KLSE by the KLSE whose own conduct is in turn governed by the Securities Commission as the regulatory body overseeing the securities industry in this country.

[79] In particular, s 9B(1) and (3) of the SIA provides that it shall be the duty of the KLSE to ensure, so far as may be reasonably practicable, an orderly and fair market in the securities that are traded through its facilities and shall take appropriate action as may be provided for under its rules for the purpose of monitoring or securing compliance with such rules.

[80] The term 'rules' is defined in s 2 of the Act as including, inter alia, 'rules or directions, by whatever name called and wherever contained, governing the ... conduct of its participating organizations formerly known as a member company) and ... rules to ensure compliance by participating organizations of any obligations imposed by this Act or any other written law and rules in respect of such other matters as may be necessary or desirable for the proper and efficient operation and management of the stock exchange, including rules specifying fees and charges'.

[81] Section 11(1) of the Act provides that any person who fails to comply with, observe, enforce or give effect to, inter alia, the rules of the KLSE has committed a breach and sub-s (2) provides that for the purpose of sub-s (1), inter alia, a participating organisation shall be deemed to be under an obligation to comply with, observe, enforce or give effect to the rules of the KLSE to the extent to which such rules purport to apply in relation to a participating organisation.

[82] In the light of the above provisions of the SIA, it is clear that apart from the remisier agreements and the KLSE Rules and regulations, the relationship between a stock broker and its traders, trader's representative or remisiers must also be considered in conjunction with and subject to the SIA.

[83] There is also no doubt that in the light of the Members' Circular No R/R 9 of 1994 and Members' Circular No 373 of 1990 issued by the KLSE to regulate the delivery and settlement of shares, including force selling of defaulting clients' shares on T+8, the obligation to force sell shares rests with the respondent as a member company of the KLSE and not the appellant as the remisier.

[84] Consequently, we are in total agreement with learned counsel for the respondent that the issue in this appeal is really not whose obligation it was to comply with the T+8 rule but whether instruction had been issued by the respondent to the appellant to sell at T+8.

[85] Having regard to the respondent's obligation under the T+8 rule, it also became clear that the object of cl 1 of the 1993 Agreement was to ensure that all share transactions entered into by the respondent's traders, trader's representatives and remisiers on its behalf comply with the rules and circular of the KLSE for the time being in force.

[86] Implied in the said cl 1 was of course a corresponding duty on the part of the respondent as a member company of the KLSE to bring to the attention and or knowledge of its traders, trader's representatives and remisiers any rule, directive or circular which may be issued by the KLSE from time to time governing trades on the stock exchange.

[87] In this case, having carefully perused the appeal records and considered the submission of the parties, we are in agreement with the finding of the learned trial judge that instruction to force sell on T+8 had been given by the respondent to the appellant vide the memo dated 22 March 1994 (see p 19 of AR Vol A4) and the letter dated 27 September 1994 (see p 18 of AR Vol A4).

[88] The respondent had also explained through DW1 that it was not its

policy or practice to give individual instruction to each remisier to force sell shares in respect of each transaction in a defaulting client's trading account. Learned counsel for the appellant had not been able to refer to any KLSE Rule or circular which requires the respondent as a stock broker to give specific individual instruction to each remisier to force sell the shares of defaulting clients in respect of each transaction.

[89] By his own account, the appellant had been a remisier with the respondent for ten years before the contra losses were incurred. The appellant should have been well versed with the T+8 rule as well as the policy and procedure of the respondent on this matter.

[90] We agree with counsel for the respondent that DW1's testimony regarding the standing instruction to force sell on T+8 vide the memo dated 22 March 1994 was not seriously challenged by the appellant.

[91] Learned counsel for the appellant had sought to submit that the respondent was not entitled to the indemnity in cl 3(2) of the 1993 Agreement if the shares were sold after T+8.

[92] It is our considered view that cl 3(2) of the 1993 Agreement as presently worded did not permit of such a construction.

[93] On the contrary, case law authorities had firmly established that the rules and by-laws of the KLSE did not have the force of law to render illegal or void a contract between a member company and a remisier or between a remisier and buyers of shares, for failure to comply with the rules or by-laws, although it may subject a member company who contravenes the rules or by-laws to penalties provided in the rules or by-laws (see *Theresa Chong v Kin Khoon & Co* [1976] 2 MLJ 253; [1976] 1 LNS 165, (FC)); *Khairuddin Abd Rahman v Capital Corp Securities Sdn Bhd* [2001] 1 LNS 148; followed in *Pan Malaysia Equities Sdn Bhd v Angeline Tan Eei We* [2010] MLJU 1528; [2011] 1 CLJ 923).

[94] In *Theresa Chong v Kin Khoon & Co* the Federal Court had made the following observation:

> The rules and by-laws of the stock exchange were binding on the members of the stock exchange. A member of the stock exchange who contravened the rules or by-laws would be liable to penalties provided in the rules or by-laws, but the rules and by-laws did not have the force of law to render illegal or void a contract between a member and a remisier or between a remisier and buyers of shares, for failure to comply with the rules or by-laws.

[95] Based on the foregoing discussions, we are of the considered view that in

this case, the learned JC had not misdirected himself on the law and the facts when he held that under cl 3(2)(b) of the agreement the appellant was liable to indemnify the respondent for the contra losses. His findings were not against the weight of the evidence before him nor were his findings of the kind that no reasonable court having properly directed itself and asked the right questions would have arrived at the same conclusion. There is therefore no reason for appellate intervention on our part (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 (CA)

ON THE COUNTERCLAIM

[96] We note that the respondent's counterclaim is for the contra losses which the respondent was not able to deduct or set-off from the appellant's security deposit due to insufficient fund therein.

[97] The learned JC, in dismissing the respondent's counterclaim, had made the following findings:

> Walau bagaimanapun, dari segi tuntutan balas defendan, mahkamah bersetuju dengan hujahan peguam plaintif bahawa tiada sebarang dokumen yang menyokong bagaimana amaun tuntutan dikira dan tiada saksi yang benar-benar tahu mengenai pengiraannya dipanggil untuk memberi keterangan. Dengan itu, keperluan s 90A Akta Keterangan tidak dipatuhi oleh itu anggapan di bawah s 114(g) wajar dikenakan terhadap defendan. Dengan itu, tuntutan balas defendan ditolak. Kos tindakan ini hendaklah ditanggungjawab sendiri oleh pihak-pihak.

[98] The question before us is whether the learned trial judge was right in arriving at the said finding. In this regard, learned counsel for the respondent sought to persuade us that the learned trial judge was plainly wrong in his findings by setting out in detail the oral and documentary evidence adduced by the respondent through DW1 on how it arrived at the figure of RM693,370.23 in its counterclaim.

[99] It was submitted that these evidence adduced by the respondent had more than proven the quantum of its counterclaim on a balance of probabilities. Nevertheless, the learned JC had completely failed to make a proper evaluation of the evidence before him and his findings were plainly wrong.

[100] Learned counsel for the appellant, on the hand did not address us on the counterclaim in his written submission and in his oral submission before us had merely contended that the learned trial judge was right in holding that the respondent had failed to prove on a balance of probabilities the quantum of its counterclaim.

[101] In our judgment, in the present case, the primary evidence as recorded in the appeal record and as outlined in the written submission of learned counsel for the respondent, which was not seriously disputed by learned counsel for the appellant, was more than sufficient to prove the quantum of the respondent's counterclaim on a balance of probabilities.

[102] We are thus of the view that the trial judge's findings on the counterclaim did not accord with the weight of the oral and documentary evidence adduced by the respondent before him, which warrant appellate intervention on our part to set aside his decision.

[103] For the reasons stated above, we dismissed the appellant's appeal and allowed the respondent's cross-appeal and set aside the decision of the High Court. We awarded costs to the respondent in the sum of RM20,000 and deposit to the respondent on account of costs.

Appeal dismissed and cross-appeal allowed.

Reported by Afiq Mohamad Noor